UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, vs. SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington, Defendants.	No. 3:09-CV-05456-BHS **REPLY TO DEFENDANTS' RESPONSE OPPOSING PLAINTIFFS' MOTION TO AMEND COMPLAINT** NOTE ON MOTION CALENDAR: October 7, 2009 The Honorable Benjamin H. Settle

I. Introduction

This memorandum is filed in response to Defendants' Opposition to Plaintiffs' Motion to Amend Complaint, (Dkt. 87) ("State's Opposition").[1] Plaintiffs seek leave to amend their complaint to join three additional claims related to the Public Disclosure Law, Wash. Rev. Code ("RCW") § 42.17.010, *et seq.*, and to join as Defendants, Rob McKenna, Attorney General of Washington, the members of the Public Disclosure Commission, and Carolyn Weikel, Auditor of Snohomish County ("Proposed Defendants"). For the reasons set forth below and in Plaintiffs'

[1] Intervenors Washington Coalition for Open Government and Washington Families Standing Together joined in the State's Opposition and have not presented their own briefing. (Dkt. 92 & 93.)

BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434

Motion to Amend Complaint, Plaintiffs should be granted leave to amend their complaint to join the additional claims and defendants.

II. Argument

A. Joinder of the Proposed Defendants is Proper Under Federal Rule of Civil Procedure 19.

Under the Federal Rules of Civil Procedure, the Court should first consider Plaintiffs' request to join Proposed Defendants pursuant to Federal Rule of Civil Procedure 19. *See* Fed. R. Civ. P. 18 cmt. regarding 1966 Amendment (stating that Rules 19, 20, and 22 do not impose special limits on the permissive joinder of claims pursuant to Rule 18.). Once a party is joined under Rule 19 or 20, a litigant may join additional claims against all, or less than all of the parties pursuant to Rule 18. *See* 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1585 (2d ed. 2009) ("Wright & Miller").[2]

Joinder of the Proposed Defendants in this case is proper under Rule 19(a)(1). On July 28, 2009, Plaintiffs filed the instant action, seeking to protect their First Amendment freedoms of speech and association. Specifically, Plaintiffs alleged that a state statute, the Washington Public Records Act, RCW 42.56.001, *et seq.*, violates their rights to advocate for the placement of Referendum 71 on the ballot as a referendum question and to urge voters to "reject" Referendum 71 at the November 3, 2009, election. (Dkt. 2 ("Verified Compl.") ¶¶ 2, 22 & 23.) Plaintiffs now seek to add three new claims, and three new parties, related to an additional state statute that further burdens Plaintiffs' First Amendment rights to encourage individuals to "reject" Referendum 71 at the November election.

Joinder of the proposed parties pursuant to Rule 19(a)(1) is required because, absent their joinder, the Court cannot accord complete relief among the existing parties. The critical question in this suit, and common to all counts, is whether Plaintiffs can advocate their message regarding

[2] "For example, A may join X, Y, and Z under Rule 20(a) in a single action only if the claims against them arise out of the same transaction or occurrence or involve a common question of law or fact. However, once the court [has determined that joinder is proper under Rule 20], Rule 18(a) controls and A may join any other claims he has against X, Y, and Z individually or any combination of those parties even if some or all of the claims are totally unrelated to those originally asserted against the three defendants." 6A Wright & Miller § 1585.

Referendum 71 free from unconstitutional restrictions on their freedoms of speech and association.

The claims included in Plaintiffs' Verified Complaint, and the new claims set forth in Plaintiffs' Proposed Verified First Amended Complaint, all involve Referendum 71, Plaintiffs' attempts to qualify it for the ballot, and their attempt to encourage citizens to "reject" Referendum 71 in the November election. Counts I and II are related to the first phase of an election, the qualification of a referendum question for the ballot. Proposed Counts III, IV, and V are related to the second phase of an election, namely, the campaign surrounding Referendum 71, and whether Washington residents should "accept" or "reject" Referendum 71 on November 3, 2009.

To see how the claims are related, one need look no further than the statutes themselves. Both the Public Records Act and the Public Disclosure Law are contained in Title 42 of the Washington Revised Code. Furthermore, the Public Disclosure Law does not distinguish between efforts to qualify a referendum question for the ballot and the ensuing campaign after it is certified for the ballot.[3] *See* RCW § 42.17.020(4) (defining a "ballot proposition" as "any 'measure' as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state . . . from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency *prior to its circulation for signatures*.") (emphasis added).[4] The Secretary of State emphasizes the overlap between the two acts in its handbook regarding initiative and referenda. *See* Sam Reed, Washington Secretary of State, *Filing Initiatives and Referenda in Washington State* at 6 (Jan. 2009) (citing registration with the Public Disclosure Commission as the *first step* in the referenda process). As a matter of statutory law, Washington considers public disclosure of referenda

[3] That is, Plaintiffs are required to register and report as a political committee during the petition circulation process.

[4] The First Amendment applies equally to the campaign to place a referendum on the ballot and to the ultimate campaign on the merits. *See, e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (analyzing provisions related to the circulation of a referendum petitions under the First Amendment); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (analyzing provisions related to the campaign surrounding a referendum question that qualified for the ballot under the First Amendment).

petitions pursuant to the Public Records Act and the public disclosure of campaign finances to be related.

The fact that the claims are all related is also supported by the "single-subject" provision of the Washington Constitution. Wash. Const. art. II, § 19. The single-subject provision states, "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." *Id*. Both the Public Records Act, the subject of Counts I and II, and the Public Disclosure Law, the subject of Counts III, IV, and V, were enacted as part of Initiative Measure 276 in November of 1972. The scope of initiative and referenda are also constrained by the single-subject provision. *See State v. Stannard*, 142 P.3d 641, 644-45, 134 Wash. App. 828, 834-35 (2006) (stating that the single-subject provision applies to initiatives and referenda). The single-subject provision indicates that the disclosure of referendum petitions pursuant to the Public Records Act and the campaign finance provisions contained in the Public Disclosure Law are related, and they have been joined at the hip since their inception. The State Defendants' arguments that the claims are unrelated, (State's Opposition at 2), is simply incorrect—each involves the campaign to place Referendum 71 on the ballot and to encourage voters to "reject" Referendum 71.

Under Federal Rule of Civil Procedure Rule 19(a)(1), Plaintiffs are *required* to join the proposed parties if the Court cannot provide complete relief in the parties absence. Here, Plaintiffs seek to exercise their First Amendment freedoms of speech an association to place Referendum 71 on the ballot and to encourage voters to "reject" Referendum 71 at the ensuing election. In their Verified Complaint, Plaintiffs properly joined the defendants necessary to protect those freedoms with respect to the first phase of the election. However, Plaintiffs failed to join the parties necessary to afford complete relief, and now seek leave of court to amend their complaint so that they may join the additional parties and the additional counts, to protect their freedoms of speech and association during the second phase of the election. If Plaintiffs are not allowed to join the additional parties, they will be free to exercise their freedoms of speech and association to place Referendum 71 on the ballot, but will be unable to exercise those same freedoms with respect to the campaign on the merits of Referendum 71. Accordingly, Plaintiffs' request for leave to file an amended complaint and to join additional parties should be granted.

The Court would arrive at a similar result if the issue is examined under the permissive joinder standards of Rule 20(a)(2). The State Defendants correctly explain that Rule 20(a)(2) sets forth two requirements for permissive joinder, namely, the transaction and common-question requirements. (State's Opposition at 5 (*citing Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1374 (9th Cir. 1980).) The rule's requirements are construed to "promote convenience and expedite resolution." *Montgomery v. STG International, Inc.*, 532 F. Supp. 2d 29, 35 (D.D.C. 2008.)

The transaction requirement "is flexible because 'the impulse is toward entertaining the broadest possible scope of action consistent with the fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Disparte v. Corp. Executive Bd.*, 223 F.R.D. 7, 10 (D.D.C. 2004) (*citing United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966)). As set forth above, each of the proposed counts involves the same transaction, or series of transactions, involved in Plaintiffs' Verified Complaint. The relevant transaction for the purpose of this suit is the campaign to place Referendum 71 on the November ballot, and the effort to encourage voters to "reject" Referendum 71. Plaintiffs simply cannot submit a referendum petition without being subject to the Public Disclosure Law. *See* RCW § 42.17.020(4); Sam Reed, Washington Secretary of State, *Filing Initiatives and Referenda in Washington State* at 6. And there can be little doubt that each of the provisions challenged herein burdens Plaintiffs' First Amendment freedoms of speech and association designed to allow them to advocate their message regarding Referendum 71.

In cases where the courts have denied joinder under Rule 20, they have done so because it was clear that the issues involved did not involve the same transaction. For example, one court denied joinder because the alleged transactions occurred four years apart. *Wilkinson v. Hamel*, 381 F. Supp. 766, 767 (W.D.Va. 1974). In others, joinder was denied because the claims were geographically dispersed and there was no indication of a common policy or practice. *Randleel v. Pizza Hut of America, Inc.*, 182 F.R.D. 542, 544-45 (N.D. Ill. 1998). Here, Plaintiffs allege that various Washington statutes violate their freedom to advocate for the placement of Referendum

71 on the ballot and for its ultimate rejection at the election. Each of the claims is related to the *same* referendum during the *same* election.

Furthermore, the harms caused by each of the statutes occurred almost simultaneously. The Public Records Act only applies to Protect Marriage Washington's activities because it submitted a referendum petition on July 25, 2009. Likewise, the Public Disclosure Law did not impose any burdens on Protect Marriage Washington until it became subject to its registration and reporting provisions. The fact that relevant reporting dates may have been available as early as September 2008, (State's Opposition at 7, n. 5), is simply irrelevant, because Protect Marriage Washington did not become subject to its provisions until May 13, 2009. (Verified Compl. ¶ 22.) Accordingly, each of the proposed claims arose directly out of the same series of transactions, the campaign surrounding Referendum 71. Thus, Plaintiffs have met the first requirement of Rule 20(a)(2).

Plaintiffs have also met the second requirement for joinder under Rule 20(a)(2). The common-question requirement is also flexible and requires "only that there be some common question of law or fact as to all of the plaintiffs' claims, not that all legal and factual issues be common to all the [defendants]." *Disparte*, 223 F.R.D. at 11 (*citing Mosley v. General Motors Corp.*, 497 F.2d 1330, 1334 (8th Cir. 1974)). Here, Plaintiffs have alleged that Washington's election statutes impermissibly burden their First Amendment freedoms of speech and association. Each of the proposed claims involves similar questions of fact and law to the claims set forth in Plaintiffs' Verified Complaint. With respect to Counts I, III, and IV, the question is whether challenged provisions that burden the freedom of speech are narrowly tailored to serve a compelling state interest. With respect to Counts II and V, the question is whether the statutes, even if narrowly tailored, remain unconstitutional because there is a reasonable probability of threats, harassment, and reprisals.

The similarity between the claims is aptly illustrated by the State's own arguments in defense of the two statutes. For example, in *Washington Initiatives Now v. Rippie*, 213 F.3d 1121 (9th Cir. 2000), the State argued that the disclosure provisions contained in the Public Disclosure Law serve "as a means to educate voters and promote confidence in government" and that the

statute is designed to "educate voters." *Id.* at 1139. The State relied upon a similar argument in defense of the Public Records Act in this case, stating "the State has an important interest in making available to the electorate information about who is essentially lobbying for their vote, and thus, who likely will benefit from the measure." (Dkt. 25 ("Defs.' Response Opposing Mot. for P.I.") at 17. To establish this proposition in support of the Public Records Act the State cited a case involving campaign finance. (*Id.* (*citing Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1105-07 (9th Cir. 2003)).) To say that the claims do not involve common questions of law and fact is contrary to the State's own arguments to challenges brought against the two statutes. Thus, Plaintiffs have met the common-question requirement for joinder under Rule 20(a)(2).

Accordingly, Plaintiffs have met the requirements for permissive joinder under Rule 20 and should be permitted to amend their complaint to join the additional parties.[5]

C. Because Joinder of the Additional Parties is Proper Under Rule 19, Joinder of the Additional Claims is Proper Under Rule 18.

As set forth in Plaintiffs' Motion to Amend, (Dkt. 85 at 5), Rule 18 is liberally interpreted. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966); *see also* 6A Wright & Miller § 1582 ("Except for the limitations imposed by the requirements of federal subject-matter jurisdiction, there is no restriction on the claims that may be joined in actions brought in the federal courts."); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (ith Cir. 1991) ("[T]he Federal Rules of Civil Procedure place no limits on the joinder of unrelated claims and parties in a single pleading."). Because the joinder of the proposed defendants is required under Rule 19, joinder of the additional claims should be permitted under Rule 18.[6]

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[5] Under Rule 20(b), the State can move for an appropriate order if it feels that joinder will prejudice it in some way. However, such an order does not overcome the convenience to the parties and the court that would occur if Plaintiffs are allowed to join these claims in this suit, as opposed to bringing a separate action.

[6] Likewise, because joinder of the additional parties is proper under Rule 20, joinder of the additional claims should be permitted under Rule 18.

D. The Secretary of State is a Proper Defendant for All Counts.

Contrary to the State Defendants' arguments, (Dkt. 87 ("State's Reply") at 5-7), Defendant Reed, Secretary of State of Washington, is a proper Defendant with respect to Counts I and II of Plaintiffs' Verified Complaint and Counts III, IV, and V of Plaintiffs' Proposed Verified First Amended Complaint.

Under the Public Disclosure Law, the "office of the secretary of state shall be designated as a place where the public may file papers or correspond with the commission and receive any form or instruction from the commission." Wash. Rev. Code § 42.17.380. The Public Disclosure Law thus contemplates that the Secretary of State can and will participate in the actions of the Public Disclosure Commission.

E. The Possibility that the *Younger* Abstention Doctrine May Apply Does Not Prevent Joinder of Count V of Plaintiffs' First Amended Complaint.

Though Defendants spend significant portions of their Opposition discussing *Younger* abstention, this does not address the pertinent aspect of amending a pleading: that, so long as there may be facts to support a claim, it should be allowed to be pled. As the Supreme Court stated in *Foman v. Davis*, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." 371 U.S. 178, 182 (1962). A year later, the Ninth Circuit further explained this low threshold for allowing amendments when it stated that "the sufficiency of an amended pleading ordinarily will not be considered on motion for leave to amend . . . ." *Breier v. Northern Cal. Bowling Proprietors' Assoc.*, 316 F.2d 787, 790 (9th Cir. 1963).

Because the sufficiency of an amended pleading is not normally considered on a motion for leave to amend, this Court should allow Plaintiffs to amend their complaint, including adding Plaintiffs' Fifth Count over the objections of Defendants, without further analysis of Defendants' asserted affirmative defense of *Younger* abstention[7]. However, even a short analysis shows that *Younger* abstention is not warranted.

[7] If this Court were to dismiss Count V at the amendment stage, this would not affect the other additional counts brought by Plaintiffs.

Defendants correctly set forth the four requirements for *Younger* abstention in the State's Opposition. *See* State's Opposition at 8; *San Jose Silicon Valley Chamber of Commerce v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008) ("*City of San Jose*"). However, this Court need only address the first of the *Younger* abstention requirements—which requires that the state proceedings be "state-initiated"—to see that *Younger* abstention does not apply here. *Id*. ("We must abstain . . . if a state-initiated proceeding is ongoing"). This first *Younger* requirement is simple, and merely requires that a state entity must be the party who initiated the proceedings in the state court or administrative proceeding. *See, e.g., Younger v. Harris*, 401 U.S. 37, 38-39 (1971) (criminal proceeding initiated by State); *Gilbertson v. Albright*, 381 F.3d 965, 983 (9th Cir. 2004) (although private party initially brought state suit, the pertinent action for *Younger* abstention "is the one initiated by the [Oregon State Board of Examiners for Engineering and Land Surveying]"); *City of San Jose*, 546 F.3d at 1089 (Elections commission investigated and initiated proceedings to fine local political action committees for campaign finance violations).

Here, the state proceeding that the State alleges requires *Younger* abstention is the proceeding brought by Protect Marriage Washington before the Public Disclosure Commission, to determine whether the State would grant Protect Marriage Washington a disclosure exemption. (*See* State's Opposition at 8-9.) This action was not initiated by the State, but at the request of Protect Marriage Washington[8]. Because the proceeding was initiated by Protect

[8] Defendants admit as much when they state that the Public Disclosure Commission meeting was held "at PMW's request." (State's Opposition at 8.) Though Defendants attempt to counter this by stating that "the PDC initiated state administrative proceedings," such proceedings were held not because the State initiated them, but because Protect Marriage Washington initiated them through a request process. (*Id*.) The declaration of Vickie Rippie submitted by the State in support of State's Opposition is clear that the hearing was not initiated by the State, but by Protect Marriage Washington. (Declaration of Vickie Rippie at ¶ 10 ("PMW's attorney Stephen Pidgeon requested a modification"), ¶ 12 ("PDC Assistant Director Doug Ellis confirmed receipt of PMW's modification request"); ¶ 13 ("the Commission conducted a public hearing on PMW's modification request").) Had the Public Disclosure Commission initiated proceedings against Protect Marriage Washington for violation of campaign finance laws, or because Protect Marriage Washington had refused to disclose contributions, *Younger* abstention might apply; however, because these proceedings were initiated by Protect Marriage Washington, *Younger* abstention does not apply.

Marriage Washington, and not a state entity, the first requirement of *Younger* abstention cannot be met, and there is no basis for this Court to grant *Younger* abstention.[9]

III. Conclusion

For the reasons set forth above and in Plaintiffs' Motion to Amend Complaint, Plaintiffs respectfully request that this Court grant their Motion to Amend Complaint.

Dated this 7th day of October, 2009.

Respectfully submitted,

/s/ Scott F. Bieniek

James Bopp, Jr. (Ind. Bar No. 2838-84)*
Sarah E. Troupis (Wis. Bar No. 1061515)*
Scott F. Bieniek (Ill. Bar No. 6295901)*
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434
Counsel for All Plaintiffs

Stephen Pidgeon
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, Washington 98201
(360) 805-6677
Counsel for All Plaintiffs

**Pro Hac Vice Application Granted*

[9] Though the Ninth Circuit has occasionally denied permission to amend a pleading, the circumstances surrounding denial have been limited. In particular, the Courts will deny permission if there are no facts that would support the proposed claim, or the claim is merely a restatement of another claim or rewording of a claim that has already been determined. *See, e.g., Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (leave to amend may be denied if futile, i.e., "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim"); *Kasey v. Molybdenum Corp. of America*, 467 F.2d 1284, (9th Cir. 1972) (leave to amend may be denied if the amendment is " a restatement of the same facts in different language or the reassertion of a claim previously determined"). Thus, even if this Court is inclined to believe that *Younger* abstention is appropriate, Plaintiffs' contention that this was not a state-initiated proceeding is enough to survive the "futility" standard that would prevent amending the complaint.

CERTIFICATE OF SERVICE

I, Scott F. Bieniek, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On October 7, 2009, I electronically filed the foregoing document described as Reply to Defendants' Response Opposing Plaintiffs' Motion to Amend Complaint with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

James K. Pharris
jamesp@atg.wa.gov
Counsel for Defendants Sam Reed and Brenda Galarza

Steven J. Dixson
sjd@wkdlaw.com
Duane M. Swinton
dms@wkdlaw.com
Leslie R. Weatherhead
lwlibertas@aol.com
Counsel for Intervenor Washington Coalition for Open Government

Ryan McBrayer
rmcbrayer@perkinscoie.com
Kevin J. Hamilton
khamilton@perkinscoie.com
William B. Staffort
wstafford@perkinscoie.com
Counsel for Intervenor Washington Families Standing Together

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 7th day of October, 2009.

/s/ Scott F. Bieniek
Scott F. Bieniek
Counsel for All Plaintiffs